UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD

AT&T SERVICES, INC.,

Respondent,

and Case No. 07-CA-228413

VERONICA ROLADER, an individual,

Charging Party.

CHARGING PARTY'S BRIEF ON THE MERITS

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INTRODUCTION AND SUMMARY

Charging Party Veronica Rolader ("Charging Party or Ms. Rolader") revoked her dues checkoff authorization ("checkoff") at a time when her employer and exclusive representative did not have a collective bargaining agreement in place. Pursuant to the plain terms of Labor Management Relations Act Section 302(c)(4), 29 U.S.C §186(c)(4) ("Section 302(c)(4)"), Ms. Rolader's checkoff revocation should have been immediately honored. However, under *Frito-Lay, Inc.*, 243 NLRB 137 (1979), Respondent AT&T Services, Inc., ("Employer" or "AT&T") refused to honor her revocation.

The Board's current precedent in *Frito-Lay* adopts an anti-textual, anti-employee interpretation of Section 302(c)(4). It creates legal ambiguity and procedural pitfalls for unwary employees where there should be none. Section 302(c)(4) is clear—employees may revoke their checkoffs "beyond" (i.e., *after*) the expiration of the applicable collective bargaining agreement ("CBA"). The Board should take this opportunity to re-evaluate its erroneous precedent limiting this statutory right, overrule *Frito-Lay, Inc.*, and return to the plain meaning of Section 302(c)(4) and fulfill the purpose of the National Labor Relations Act ("Act")—employee free choice. *See Fry's Food Stores*, 366 NLRB No. 138, at n.6 (July 24, 2018) (indicating that Member Kaplan believes the *Frito-Lay* "area[] of Board law warrant[s] reform and in a future appropriate case he would examine the correctness of . . . the foregoing decision[].").

The Board should also find Charging Party's checkoff revocation valid based on the rationale of *Penn Cork & Closures, Inc.*, 156 NLRB 411 (1965), *enforced*, 376 F.2d 52 (2d Cir. 1967). Michigan's passage of a Right to Work law operated as a changed circumstance of the kind the Board recognized in *Penn Cork*, which allows employees to revoke their checkoffs at will. Thus,

given the changed circumstances wrought by Michigan's passage of its Right to Work law, Charging Party was entitled to revoke her checkoff when she sent her first letter.

Additionally, Charging Party's checkoff contained arbitrary restrictions on her ability to revoke the checkoff, and those restrictions must be declared unlawful. Specifically, the checkoff requires employees to send their revocation "individually" and by certified mail. These requirements unduly burden employees' Section 7 rights. *See* 29 U.S.C. § 157.

Finally, AT&T failed to provide Ms. Rolader with the complete and correct dates during which she could revoke her checkoff. The Board should find AT&T violated Section 8(a) of the Act through all of the above actions. 29 U.S.C. § 158(a).

FACTS AND PROCEDURAL HISTORY

On January 4, 2000, Charging Party signed a checkoff authorizing AT&T to deduct an amount equal to union dues from her salary. Stipulation at ¶ 8; Ex. 3.[1] She signed this checkoff well before Michigan enacted its Right to Work Law in 2012, *see* 2012 Mich. Pub. Act No. 348, at which time her choice was to pay full dues or compulsory fees to Local 4009, Communications Workers of America and its affiliates ("Union") as a condition of her employment.

The pertinent terms of the checkoff Charging Party signed are as follows:

> I hereby authorize AT&T to deduct from my salary or wages . . . an amount equal to regular monthly Union dues. If for any reason AT&T fails or is unable to make a deduction. I authorize AT&T to make such deduction in a subsequent payroll period.
>
> The amount equal to regular monthly Union dues shall be that which is certified to AT&T by the Communications Workers of America for the bargaining unit and job in which I am employed and shall automatically be adjusted for any bargaining unit and job changes.

[1] This case was submitted to the Board on a stipulated record, which the Board accepted by Order dated July 28, 2020. Charging Party refers to the Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts as "Stipulation" and will cite to its exhibits as "Ex."

> This authorization shall remain in effect when I am employed by AT&T unless cancelled by me. Such cancellation must be individually sent to my AT&T Payroll Office and to the Union Local by Certified Mail postmarked within the fourteen (14) day period prior to the contract anniversary date (defined as each 365 day period from the date of the execution of this Agreement) or termination date of the current or subsequent Collective Bargaining Agreement, and shall be effective in the first payroll period in the following month.
>
> This authorization is voluntarily made in order to pay my fair share of the Union's cost of representing me for purpose of collective bargaining, and this authorization is not conditioned on my present or future membership in the Union.

Ex. 3.

On April 14, 2018, the applicable CBA between AT&T and the Union expired. *See* Ex. 2. A new CBA was not finalized by the parties until August 5, 2019. Stipulation at ¶ 15; *see* Ex. 9. On or about June 14, 2018, during the time in which the Union and Employer had no effective CBA, Charging Party sent a letter to the Union and the Employer resigning from the Union and revoking her checkoff. Stipulation at ¶¶ 10(b), 11(a); Exs. 4–5. Neither party accepted her revocation.

AT&T explicitly rejected Charging Party's checkoff revocation in an e-mail dated June 25, 2018. Stipulation at ¶ 11(b); Ex. 7. According to AT&T, Charging Party's revocation letter was untimely and did not conform with the "guidelines for requesting a cancellation of union dues deductions set forth in [the] bargaining agreement." *Id.* AT&T's e-mail directed her to review the guidelines for revocation in Article 7 of the CBA. Moreover, the e-mail limited her revocation period to a "window period" of March 31, 2018–April 13, 2018, keyed only to the anniversary of the CBA.

CBA Article 7.04 states, in pertinent part:

> Any authorization of dues deduction shall not be subject to revocation except that an employee may revoke the authorization during the period beginning fourteen (14) days prior to each anniversary date, or during the period beginning fourteen (14) days prior to the termination date of this Collective Bargaining Agreement. Revocation of dues must be accomplished as follows:

> (A) Each employee who desires to revoke his or her dues deduction authorization must advise his or her Payroll Office by an individually signed letter. There shall be only one (1) letter per envelope.
>
> (B) The letter to the Payroll Office must be sent by Registered or Certified Mail.
>
> (C) Each such letter not postmarked within the specified time limits and in accordance with the above procedure will be considered void and the employee will be so advised by the Company.

Ex. 2, CBA with effective dates of Apr. 12, 2015–Apr. 14, 2018, § 7.04.

On September 28, 2018, Charging Party filed this unfair labor practice ("ULP") charge against AT&T for its failure to accept her checkoff revocation, and for its maintenance of restrictive checkoff revocation procedures. Stipulation at ¶ 1; Ex. 1(a).[2] Charging Party sent a second revocation letter to both the Union and AT&T on about December 22, 2018, this time within the window period prescribed in the checkoff itself (as well as during the continuing contract hiatus). Stipulation at ¶ 10(c); *see* Exs. 6–7. On January 2, 2019, AT&T again refused to accept Charging Party's revocation, this time claiming it was outside the window period tied to the anniversary of the contract. Ex. 8. AT&T once again directed Charging Party to review the requirements in Article 7 of the CBA. Ex. 8.

AT&T continued to deduct dues from Charging Party's wages and remit them to the Union from June 18, 2018, the date of Charging Party's first revocation letter, through February 1, 2019. Stipulation at ¶ 13.

[2] Charging Party filed a parallel charge against the Union, Case No. 07-CB-227560, which the Union settled through an Informal Settlement Agreement. *See* Charging Party's Opp. to CWA's Mot. to Intervene & Mot. to Remand & Reopen the Record (filed Aug. 3, 2020); *see also* Local 4009, Commc'ns Workers of Am., NLRB, https://www.nlrb.gov/case/07-CB-227560. The Union complied with the terms of its settlement, and that case is now closed.

On August 5, 2019, AT&T and the Union entered into a new CBA. Stipulation at ¶ 15; Ex. 9. On November 7, 2019, the General Counsel issued the operative complaint in this proceeding. Ex. 1(h). A hearing was ultimately set for January 23, 2020. *See* Ex. 1(m). However, on January 22, 2020, the parties agreed to the Stipulation and filed the Joint Motion to Submit Stipulated Record to the Board and Joint Stipulation of Facts, making a hearing unnecessary. The Board granted the Parties' Motion in its July 28, 2020 Order Approving Stipulation.

ARGUMENT

I. Charging Party Validly Revoked Her Checkoff

A. Charging Party was entitled to revoke her checkoff at will during the contractual hiatus.

Charging Party revoked her checkoff on June 14, 2018, and again on December 22, 2018. Stipulation at ¶¶ 10(b)–(c). She sent both of these letters during a "contractual hiatus," meaning the CBA had expired and the Employer and Union had not yet executed a new one. Stipulation at ¶ 15. Pursuant to Labor Management Relations Act Section 302's plain terms, Charging Party was entitled to revoke her checkoff at will during the hiatus period. AT&T violated Section 8 of the Act by failing to honor the revocations and by continuing to deduct dues from her wages and remit them to the Union.

1. Section 302 requires checkoffs to be revocable during a contractual hiatus.

Pursuant to Section 302(c)(4), an employer may only deduct dues from an employee's wages and remit them to a union when:

> the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.

29 U.S.C. § 186(c)(4). Thus, for a checkoff to be valid under Section 302(c)(4)'s proviso, it must provide an employee with two distinct rights with respect to checkoff revocation: (1) at least annually (by prohibiting checkoffs that are irrevocable for longer than one year), *and* (2) "beyond the termination date of the applicable collective agreement." *Id.*; *see NLRB v. Atlanta Printing Specialties & Paper Prods. Union 527*, 523 F.2d 783, 787 (5th Cir. 1975). If a checkoff does not comply with these conditions it cannot constitute an exception under Section 302(c)(4), and any deduction pursuant to an invalid authorization violates Section 302. Similarly, any deduction without a valid authorization constitutes an unfair labor practice. *See Indus. Towel & Unif. Serv.*, 195 NLRB 1121, 1121 (1972), *enforcement denied on other grounds*, 473 F.2d 1258 (6th Cir. 1973) (footnote omitted) ("It is now well settled that the deduction of dues from an employee's pay after the employee has validly revoked the checkoff authorization constitutes a violation of Section 8(a)(2) of the Act."); *see also, e.g.*, *Newport News Shipbuilding & Dry Dock Co.*, 253 NLRB 721, 726 (1980), *enforced*, 663 F.2d 488 (4th Cir. 1981); *Merchants Fast Motor Lines*, 171 NLRB 1444, 1445 (1968).

This statutory mandate cannot be clearer. For a dues checkoff authorization to be valid, Section 302(c)(4) requires that it must be revocable *beyond* the termination date of the applicable CBA. The operative term, "beyond," means "on or to the farther side of," "at a greater distance than," and "in a degree or amount surpassing." *See Merriam-Webster Online Dictionary*, https://www.merriam-webster.com/dictionary/beyond (last visited Sept. 8, 2020). Therefore, the employee must be entitled to revoke the checkoff at any time during a contractual hiatus. Otherwise, the checkoff does not meet the strict requirements of Section 302(c)(4), and any deduction by an employer pursuant to the checkoff would violate Section 302, and constitute an unfair labor practice under Section 8.

Various courts have recognized this straightforward legal principle. *See Atlanta Printing Specialties*, 523 F.2d at 787–88 ("The union concedes that when there is no collective bargaining agreement in effect, dues checkoff authorizations are revocable at will."); *Anheuser-Busch, Inc. v. Int'l Bhd. of Teamsters, Local 822*, 584 F.2d 41, 43 (4th Cir. 1978) (internal citation omitted) ("§ 302(c)(4) of the Taft-Hartley Act guaranteed the employees the right to revoke their checkoff authorizations at will during the hiatus between collective bargaining agreements."); *Washington-Balt. Newspaper Guild Local 35 v. Washington Post Co.*, No. 77-537, 1979 WL 1847, at *2 (D.D.C. Apr. 4, 1979), *aff'd*, 626 F.2d 1029 (D.C. Cir. 1980) ("We hold as a matter of law that a dues checkoff authorization was not binding beyond the expiration date of the Agreement and after such date may be freely revoked."); *United Elec., Radio & Mach. Workers of Am. v. Westinghouse Elec. Corp.*, 345 F. Supp. 274, 275 (W.D. Pa. 1972), *aff'd*, 478 F.2d 1399 (3d Cir. 1973) (recognizing the ability of employees to revoke after the expiration of the CBA); *Murtha v. Pet Dairy Prods. Co.*, 314 S.W.2d 185, 189–90 (Tenn. Ct. App. 1957) (revocations allowed at any time during a contractual hiatus); *see also Stewart v. NLRB*, 851 F.3d 21, 32–35 (D.C. Cir. 2017) (Silberman, J., concurring in judgment & dissenting). Similarly, academics have recognized that Section 302 requires checkoffs to be revocable at will during a contractual hiatus. *See* James Achermann, *Small Gifts & Big Trouble: Clarifying the Taft-Hartley Act*, 44 UNIV. OF S.F. L. REV. 63, 67 (2009) (recognizing an "employee may revoke an authorization at will during the time between collective bargaining agreements"); *The Developing Labor Law: The Board, the Courts, and the National Labor Relations Act*, 26-83, (John E. Higgins, Jr., ed., 7th ed. 2017) ("[A]n employee may revoke an authorization at will during the hiatus between collective bargaining contracts . . . .").

The Board also has recognized the plain meaning of Section 302. In *WKYC-TV, Inc.*, 359 NLRB 286, 292 (2012), the Board stated employees "are free to revoke their checkoff authorizations when the collective-bargaining agreement expires." *See also San Diego Cnty. Dist. Council of Carpenters*, 243 NLRB 147 (1979) (resignations during contractual hiatus sufficient to trigger revocation of checkoff pursuant to Section 302(c)(4)); *Chem. Workers, Local 143 (Lederle Labs.)*, 188 NLRB 705, 707 (1971) (finding employees' checkoffs "became terminable at will after the contract expired"); *Lowell Corrugated Container Corp.*, 177 NLRB 169, 173 (1969) (adopting ALJ finding that an "employee is free to repudiate or revoke his [checkoff] authorization at any time after the contract expire[s]").

Applying this simple principle here requires a finding that Charging Party validly revoked her checkoff, not once but twice, during a contractual hiatus—"beyond" the term of the applicable CBA.

2. The Board's current precedent is contrary to the plain meaning of Section 302 and should be overruled.

Notwithstanding this straightforward legal principle, *Frito-Lay, Inc.*, 243 NLRB 137, allows employers and unions to limit employees' ability to revoke their checkoffs to short window periods that occur *prior* to contract expiration. This Board precedent is directly contrary to the plain meaning of Section 302 and should be overturned.

In *Frito-Lay*, the operative checkoff restricted its revocation to "not more than twenty (20) days and not less than ten (10) days prior to the expiration of each period of one year or of the applicable collective bargaining agreement." *Id.* at 137.[3] A two-Member Board majority held that

[3] Charging Party's checkoff has a similar limitation—it purported to restrict her ability to revoke upon contract expiration to "the fourteen (14) day period *prior* to the . . . termination date of the current or subsequent Collective Bargaining Agreement." Ex. 3 (emphasis added).

this window period did not violate the Act. In doing so, the majority created a statutory fiction by substituting the word "at" for "beyond" in Section 302(c)(4), holding that employees need only be given the opportunity to revoke a checkoff "*at* the termination of any 'applicable collective-bargaining agreements.'" *Id.* at 138 (emphasis added). The Board majority concluded that the checkoff's window period of ten days *before* a contract's expiration complied with Section 302(c)(4), as it gave employees an opportunity to revoke "at" the termination of a CBA. *Id.* at 138–39.[4]

Member Murphy dissented. Her dissent correctly explained that Section 302(c)(4)'s use of the phrase "*beyond the termination date* of the applicable collective agreement" plainly means employees can revoke any time after a contract ceases to be in effect. *Id.* at 140 (emphasis added) (Member Murphy, dissenting). She also pointed out that the Board had already correctly decided this issue in *Lederle Labs.*, 188 NLRB 705, *Lowell Corrugated Container Corp.*, 177 NLRB 169, and *San Diego County District Council of Carpenters*, 243 NLRB 147. *Frito-Lay*, 243 NLRB at 140 & nn. 7, 9; *see also NLRB v. Lion Oil Co.*, 352 U.S. 282 (1957) (interpreting the Labor Management Relations Act and the National Labor Relations Act provisions together as a single law).

The patent legal absurdity of the Board's current precedent is highlighted in the protracted *Fry's Food Stores* litigation.[5] In that case, the checkoff contained language similar to the one in this case and in *Frito-Lay*, and the employees revoked their checkoffs during a hiatus. *Fry's I*, 358

[4] The *Frito-Lay* majority justified its interpretation using legislative history. 243 NLRB at 138. However, when the statute is clear and straightforward (as it is here) legislative history is irrelevant and unpersuasive. *United States v. Gonzales*, 520 U.S. 1, 6 (1997) (citing *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 254 (1992)).

[5] *See, e.g.*, *Fry's Food Stores*, 366 NLRB No. 138 (July 24, 2018) (*Fry's II*); *Stewart v. NLRB*, 851 F.3d 21 (D.C. Cir. 2017); *Fry's Food Stores*, 362 NLRB 292 (2015); *Fry's Food Stores*, 358 NLRB 704 (2012) (*Fry's I*).

NLRB at 706. The Board affirmed the ALJ's decision that *Frito-Lay* controlled—that the window period tied to contract expiration was lawful—and dismissed the complaint. *Id.* at 704.

On appeal, the D.C. Circuit had to engage in interpretive gymnastics in order to avoid dealing with *Frito-Lay*'s infirmities. The D.C. Circuit majority sidestepped *Frito-Lay* by ignoring the text of the checkoff, which clearly communicated a restrictive window period upon contract expiration. Instead, the court majority relied upon a comment by the ALJ that limited this revocation window period to only employees who signed checkoffs during the last year of the contract—notwithstanding the ALJ's and Board's conclusion that *Frito-Lay* applied, and the understanding of all of the parties that employees could revoke during the window period. *Stewart*, 851 F.3d at 27–28. On that basis, the majority held that the Board incorrectly applied *Frito-Lay* to the facts in the first instance and remanded for further proceedings. *Id.* at 32. In dissent, Judge Silberman recognized that the majority's attempt to avoid discussing *Frito-Lay* created an ambiguity where none existed, *Id.* at 32–33 (Silberman, J. dissenting).[6]

Judge Silberman then did what the majority should have done: he engaged in a meaningful analysis of the correct issue in that case (and the issue presented here), namely, "a straightforward dispute over the proper interpretation of . . . [S]ection 302." *Id.* at 32. He recognized that the Board in *Frito-Lay* adopted "an anti-textual interpretation of the phrase, 'beyond the termination'" because "[i]t essentially claims that 'beyond' can mean 'before.'" *Id.* at 35. Judge Silberman concluded that the Board's interpretation "is flatly wrong" and the Board impermissibly "engaged in a blatant attempt to rewrite a statute in which Congress spoke plainly." *Id.*

[6] In any event, if these windows are "ambiguous," any ambiguity should be resolved in favor of employees, not the drafters of the checkoff.

On remand, the Board dodged the *Frito-Lay* question on procedural grounds. *Fry's II*, 366 NLRB No. 138, at *6 (noting that the General Counsel failed to timely raise a facial challenge to the checkoff). Therefore, after six years of litigation, the Board did not resolve the underlying issue, namely whether *Frito-Lay* was correctly decided in accordance with Section 302(c)(4).

This case presents an excellent opportunity for the Board to do what it should have done in *Stewart*—revisit and correct its erroneous *Frito-Lay* decision. *Frito-Lay* is inconsistent and irreconcilable with the Board's prior decisions addressing this issue in *San Diego County District Council of Carpenters*, 243 NLRB 147; *Lederle Labs.*, 188 NLRB 705; *Lowell Corrugated Container Corp.*, 177 NLRB 169; and its more recent decision in *WKYC-TV, Inc.*, where the Board justified its holding, in part, on the recognition that employees "are free to revoke their checkoff authorizations when the collective-bargaining agreement expires." 359 NLRB 286, 292 (2012); *see also Lincoln Lutheran*, 362 NLRB 1655 (2015) (constitutionally valid Board re-affirming *WKYC-TV*). *WKYC-TV* cited the right to revoke at will during a hiatus as a "rule" safeguarding employee free choice. 359 NLRB at 292; *see also Lincoln Lutheran*, 362 NLRB at 1662 ("Section 302(c)(4) explicitly states that they can revoke their authorizations when the union-security clause expires.").

Similarly, *Frito-Lay* is inconsistent with the Board's recent holding in *Valley Hospital Medical Center*, 368 NLRB No. 139 (Dec. 16, 2019). There, the Board recognized that employers can cease deducting dues whenever a CBA expires. *Id.* That holding simply cannot be reconciled with *Frito-Lay*. If an employer can cease deductions unilaterally at any time during a contractual hiatus, surely an employee—who possesses Section 7 rights—can do the same when she wishes to exercise them by stopping dues deductions. The Board can resolve these irreconcilable conflicts in its jurisprudence simply by overturning *Frito-Lay*.

3. *Frito-Lay* is inconsistent with the purpose of Section 302 and the Act.

The purpose of the Act is to protect *employee* rights. *See, e.g.*, *Pattern Makers' League of N. Am. v. NLRB*, 473 U.S. 95, 107 (1985) ("voluntary unionism" is the purpose of the Act); *Lechmere, Inc. v. NLRB*, 502 U.S. 527, 532 (1992) ("By its plain terms . . . the NLRA confers rights only on *employees*, not on unions or their nonemployee organizers."). Section 7 of "the Act protects, with equal vigilance: *the rights of employees* to *engage in* and to *refrain from* union or other concerted activities." *Machinists, Local 1414 (Neufeld Porsche-Audi, Inc.)*, 270 NLRB 1330, 1334 (1984) (first emphasis added).

Section 302(c)(4) similarly has an employee-protection purpose. *See* Achermann, *Small Gifts & Big Trouble*, 44 Univ. of S.F. L. Rev. at 67 (citations omitted) (recognizing one of the purposes of Section 302(c)(4) is "to ensure . . . the 'protection of the employee'. . . .'"); *see also Associated Builders & Contractors v. Carpenters Vacation & Holiday Tr. Fund*, 700 F.2d 1269, 1276 (9th Cir. 1983) (citing 93 Cong. Rec. 4876 (1947) (statement of Sen. Taft), *reprinted in* 2 NLRB, *Legislative History of the Labor Management Relations Act, 1947,* at 1311 (1948)) ("[T]he purpose of requiring an employer to receive authorization is to prohibit the deductions of dues without an employee's consent.").

The Fifth Circuit in *Atlanta Printing Specialties*, explained:

> We believe that Congress sought to strike a balance between employee and union protection. . . . *Felter* [*v. Southern Pacific Co.*, 359 U.S. 326 (1959)] makes it clear that Congress intended to preserve the employees' freedom of choice to refrain from union membership. The reason for the annual escape period was to allow the employee to reconsider at least once a year. Arguably, the reason for the contract expiration escape period was that the employee should have an opportunity to reconsider at the point when the collective bargaining agreement under which he paid dues would end. At that time either a new collective bargaining agreement would be negotiated, with terms as yet unknown, or there would be no contract in existence.

523 F.2d at 787–78. Thus, the limitations on irrevocability periods were put in place to protect employees' right to revoke from undue restrictions by employers and unions.

These two underlying purposes are complementary. Both recognize the fundamental importance of employee choice and voluntary unionism. The window period limitations approved by *Frito-Lay* and present in this case are directly contrary to these purposes—they unduly burden employees' ability to exercise their Section 7 right to refrain, and should be prohibited.

Specifically, under *Frito-Lay*, employees can be held to restrictive window periods in checkoffs that they signed many years in the past or may not have easy access to. *See, e.g.*, *Ruisi v. NLRB*, 856 F.3d 1031 (D.C. Cir. 2017) (requiring employees to submit a written request for their window period dates); *Teamsters Local 385 (Walt Disney World Co.)*, 366 NLRB No. 96 (June 20, 2018) (union ignored non-written requests for checkoff revocation information and required such requests to go through a single union official). These unknown restrictions can make exercising Section 7 rights difficult. Returning to the plain meaning of Section 302(c)(4) and allowing employees to revoke at will during a contractual hiatus will provide *all* employees with a universally-known window period during which they can revoke their checkoffs. Employees thus would be able to exercise their Section 7 rights more easily, and without having to jump through the extra hoop of requesting their window period and/or a copy of their checkoff, or having to revoke in the dark in order to receive notice of their window period dates.

Charging Party recognizes the complicated technicalities involved in these checkoff window period cases. If it chooses, the Board could avoid parsing the language of Section 302(c)(4) and protect employees' rights by overturning its holdings in *Elec. Workers, Local 2088 (Lockheed Space Operations Co.)*, 302 NLRB 322 (1991) and *National Oil Well*, 302 NLRB 367 (1991). *See Fry's II*, 366 NLRB No. 138 at n.6 (Member Kaplan noting that he favors revisiting these cases).

Such a decision would allow employees to revoke their checkoffs simply by resigning from the union, regardless of any restrictions set forth in a checkoff. This would be consistent with the purpose of the Act and Section 302(c)(4), and would create a system that maximizes the exercise of Section 7 rights: employees who wish to support their union could continue to have dues deducted pursuant to their checkoffs, while those who no longer wished to support the union could stop dues deductions through an immediately effective checkoff revocation. Here, the result would be the same: Charging Party validly revoked her checkoff by sending her June 14, 2018 letter.

In summary, the plain language of Section 302 requires a checkoff to be revocable at least during a contractual hiatus, i.e., "beyond the termination date of the applicable collective agreement." This legal principle has been repeatedly recognized by courts and the Board—except in the relevant case on point, *Frito-Lay*. In that case, the Board inexplicably misread and misapplied Section 302(c)(4) and allowed unions and employers to restrict employee revocations to a short window period merely "tied" to contract expiration. Here, Charging Party revoked her checkoff during a contractual hiatus in June 14, 2018 and in December 22, 2018. Under the plain meaning of Section 302, she validly revoked her checkoff. However, AT&T rejected her revocations because they were outside the window period allowed by *Frito-Lay*. The Board should take this opportunity to revisit *Frito-Lay* and return its precedent to the correct and plain meaning of Section 302(c)(4). Once the Board correctly interprets Section 302, it will have little choice but to find that AT&T violated Section 8(a) when it rejected Charging Party's checkoff revocation during a time period when the parties had no CBA in effect and continued to deduct dues from her paycheck and remit them to the Union.

B. Charging Party validly revoked her checkoff because the enactment of Michigan's Right to Work law was a "changed circumstance."

In addition, Charging Party's checkoff should be considered revoked because the enactment of Michigan's Right to Work law, 2012 Mich. Pub. Act No. 348, is a "changed circumstance" that permits her and others to revoke their checkoffs at will. *See Penn Cork & Closures*, 156 NLRB 411; *Metalcraft of Mayville, Inc.*, 367 NLRB No. 116 (Apr. 17, 2019).

In *Penn Cork*, the Board held that a successful deauthorization election is a sufficient changed circumstance such that employees were entitled to revoke their checkoffs at will. Importantly, the Board recognized that the checkoffs were not actually voluntary: "[O]n the facts before us we cannot agree that the exercise of this option by employees is in all circumstances independent of the impact of union security." *Penn Cork*, 156 NLRB at 414. The Board determined that allowing checkoffs to be revocable at will after a deauthorization was consistent with the statutory protections in Section 9(e), 29 U.S.C. § 159(e), and congressional intent. It recognized that limiting employees to a narrow "window period" after a successful deauthorization election would render Section 9(e)'s right to deauthorize a forced dues clause "empty." *Id.* at 414–15. This principle has been reiterated by the Board in subsequent cases. *Bedford Can Mfg. Corp.*, 162 NLRB 1428 (1967) (following *Penn Cork*) and *Merchants Fast Motor Lines*, 171 NLRB No. 1444 (same in a Right to Work state).

The enactment of a new Right to Work law is, in essence, a state-wide deauthorization election that constitutes a "changed circumstance" under *Penn Cork*. Prior to the enactment of a Right to Work law, employees signed checkoffs under a compulsory "union security" regime. When a state passes a Right to Work law, just like individuals who won a deauthorization election, employees in that state are freed from any requirement to pay fees to a union as a condition of their employment. In effect, just like in a deauthorization election, a Right to Work law frees employees from

the requirement of paying dues or fees as a condition of their employment. The only difference between a deauthorization and a Right to Work law is the manner in which the employees voted to eliminate the union's ability to compel dues. In the case of a deauthorization election, the employees directly voted to prohibit the union from collecting a compulsory fee under NLRA Section 9(e). In the case of a Right to Work law, employees also voted—for state representatives who exercised the same right pursuant to NLRA Section 14(b), 29 U.S.C. § 164.

In *Metalcraft of Mayville*, 367 NLRB No. 116, the Board recognized the reasonableness of this application of *Penn Cork*. In that case, an employer ceased deducting dues pursuant to checkoffs after the enactment of Wisconsin's Right to Work law. The Board reiterated its correct conclusion that checkoffs are tied to "union security." *Id.* at *5–6.

The Board should take the natural next step and affirmatively apply its holding in *Penn Cork* to the Right to Work law context. Here, Charging Party signed her checkoff in 2000, before Michigan enacted its Right to Work law. Thus, she signed her checkoff under a compulsory unionism NLRA regime: her choice was to pay full Union dues or a compulsory agency fees—either way, she had to pay. In 2012, Michigan enacted its Right to Work law and freed all employees from the requirement of paying fees to a union as a condition of their employment. Thus, Charging Party's circumstances have materially changed. Now, Charging Party has a choice to pay Union dues as a member, or nothing as a non-member. As the Board recognized in *Penn Cork*: "In these circumstances it would be unreasonable to infer that all employees who authorized the checkoff would have done so apart from the existence of the union-security provision and the necessity of paying union dues, or to infer that these same employees would, as a whole, wish to continue their checkoff authorizations even after the union-security provision was inoperative." *Penn Cork*, 156 NLRB at 414; *see also Lockheed Space Operations Co.*, 302 NLRB at 328-29 (where an employee

executes a checkoff in a Right to Work state, his or her resignation from union membership automatically extinguishes any further obligation to pay dues, unless it contains a clear waiver of the right to revoke).

Such a result is also consistent with basic contract law:

> It is elementary that an ambiguity in a contract . . . is to be interpreted in light of the circumstances surrounding the time the contract was made. . . . Because the power of revocation is a subsidiary provision of the dues authorization contract, a fortiori, it must be interpreted in light of circumstances surrounding the time the authorization contract was made.

Atlanta Printing Specialties, 523 F.2d at 785 (citing 3 *Corbin on Contracts* § 536 (1960); 1A *Corbin on Contracts* § 265 (1963)). Thus, based on a material changed circumstance—the enactment of Michigan's Right to Work law that is identical in function to a deauthorization—Charging Party's checkoff should be deemed revoked at the time she resigned her Union membership in June 2018.

Therefore, based on the plain text of Section 302(c)(4) and the rationale in *Penn Cork*, AT&T violated Section 8(a) by refusing to honor Charging Party's valid revocations and by deducting dues from her wages and remitting them to the Union without authorization.

II. AT&T Failed to Give Charging Party the Correct Dates During Which She Could Revoke Her Checkoff

AT&T failed to provide Charging Party the proper dates during which she could revoke her checkoff. In its two rejection letters, it stated that her request was untimely and gave a single revocation window period of March 31–April 13. Exs. 7–8.[7] Setting aside the fact that this window incorrectly limits employee revocation to a short window period prior to the CBA's anniversary date, the e-mails failed to notify Charging Party of her ability to revoke during the window

[7] Additionally, AT&T's first e-mail, dated June 25, 2018, failed to provide any prospective dates for revocation. Instead, it provided the window period for 2018, which had already closed. Ex. 7.

period occurring during the fourteen days prior to the anniversary of the checkoff. *See* Ex. 3 (emphasis added) (allowing Charging Party to revoke "within the fourteen (14) day period prior to the contract anniversary date (defined as each 365 day period from the date of the execution of *this Agreement*).").

A party that rejects a checkoff revocation as untimely should be required to provide the exact dates during which an employee can revoke her checkoff. Such a requirement is consistent with the Act and promotes its purpose—employee free choice—while imposing a minimal burden (if any) on the rejecting party. *See* General Counsel Memo. 19-04, Unions' Duty to Properly Notify Employees of Their *General Motors/Beck* Rights and to Accept Dues Checkoff Revocations after Contract Expiration, at 8–9 (Feb. 22, 2019). To deny a revocation as untimely, a rejecting party must calculate the actual window periods and must notify employees of the rejection. It imposes no real burden on the rejecting party to require it to include the window period it already calculated in the rejection notification it must already send. This requirement would greatly assist employees in the exercise of their Section 7 rights. Failure to provide this highly important information should be a violation of Section 8.

III. Unlawful Requirements in the Checkoff

In addition to the above, Charging Party's checkoff contained unlawful restraints on revocation the Board should find unlawful. Specifically, Charging Party's checkoff required revocations to be sent individually, and by certified mail.[8] Both of these requirements were also found in Article 7 of the CBA, which AT&T cited and enforced against Charging Party in its e-mails rejecting her revocation. Exs. 7–8. These requirements unlawfully restrain and coerce Charging Party and other

[8] Ex. 2 at 8, art. 7.04(A) (requiring revocation to be made by individual letter, with one letter per envelope); Ex. 9 at 8, art. 7.04(A) (same); Ex. 2 at 8, art. 7.04(B) (requiring revocation to be sent to the Payroll Office by Certified or Registered mail); Ex. 9 at 8, art. 7.04(B) (same).

employees in the exercise of their Section 7 right to refrain from financially assisting a union in violation of Section 8.

The underlying guiding principle was outlined by the Supreme Court in *Felter*, 359 U.S. 326. In that case, the Supreme Court recognized the bar for an unduly burdensome requirement is low: "any complication of the procedure necessary to withdraw or the addition of any extra steps to it may be burdensome." *Id.* at 336; *see Newport News Shipbuilding*, 253 NLRB at 731 (applying *Felter* to the NLRA); s*ee also Elec. Workers, Local 66 (Houston Lighting & Power Co.)*, 262 NLRB 483, 486 (1982) (footnote omitted) (holding "a member may resign from the union at will so long as the desire to resign is clearly communicated," and "such communication may be made in any feasible way and no particular form or method is required"). In *Felter*, the Supreme Court struck down a requirement that checkoff revocations be submitted on a union-provided form. 359 U.S. at 338.

Most recently, in *Local 58, IBEW (Paramount Industries, Inc.)*, 365 NLRB No. 30 (Feb. 10, 2017), *enforced*, 888 F.3d 1313 (D.C. Cir. 2018), the Board and the D.C. Circuit recognized that unions cannot be allowed to complicate and burden revocation procedures. "Just as the Respondent's policy unlawfully restricts the Section 7 right to resign union membership, so does it impermissibly restrain the revocation of dues checkoff authorizations, which also implicates the Section 7 right to refrain from union activity." 365 NLRB No. 30, at *4 (footnoted omitted).

A. Certified or registered mail requirements are unlawful.

Charging Party's checkoff requires a revocation to be sent by certified mail to the AT&T Payroll Office. *See* Ex. 3. This requirement—that the employee go to the post office to certify her revocation letter, thereby increasing the cost of mailing—is unduly burdensome.

The Board recognized this principle in *California Saw & Knife Works*, 320 NLRB 224 (1995), when it struck down certified mail requirements for *Beck* objections as an arbitrary restraint on an employees' Section 7 rights. *Id.* at 236–37. The Board recognized that such a requirement has no "realistic value to the Union and is therefore a needless and impermissible impediment to the employees' exercise of . . . Section 7 rights." *Id.* at 236, 292. Similarly, the Board and the Sixth Circuit both recognized the burdensome nature of certified mail restrictions for resignations from union membership in *Auto. Workers Local 449 (Nat'l Metalcrafters, Inc.)*, 285 NLRB 1189 (1987), *enforced in relevant part sub nom.*, *UAW v. NLRB*, 865 F.2d 791 (6th Cir. 1989) (striking down a requirement that employees use registered or certified mail to resign). The consistent Board and court rulings against certified mail restrictions apply with equal force to checkoff revocations, which are also an exercise of employees' Section 7 rights. *Paramount Indus., Inc*, 365 NLRB No. 30.

Sending a revocation by certified or registered mail operates primarily as a benefit to the sender, namely it provides proof to the sender that the intended recipient actually received the mailing. Such a mailing provides no similar benefit to the recipient, here AT&T and the Union. The only reasonable rationale for this requirement is to add hurdles to an already burdensome and extremely time-sensitive checkoff revocation process, for if an employee misses a "window" by even one day she is stuck paying dues for a whole year. Thus, the certified mail only requirement is an arbitrary and bad faith restriction on Section 7 rights, in violation of Section 8. This is especially true in the age of computers, faxes, and e-mail—modern communications conveniences which AT&T maintains, and therefore surely has access. *See generally* General Counsel Memo. 19-04.

The Board should find that AT&T violated the Act by maintaining and enforcing this obsolete and useless restriction on checkoff revocation.

B. Individual mailing requirements are unlawful.

Charging Party's checkoff also requires a revocation be sent by individually signed letter, with only one letter per envelope. Ex. 3; *see also* Ex. 2 at 8, Art.7.04(A); Ex. 9 at 8, Art. 7.04(A). In other words, employees cannot send joint letters or multiple letters together in one envelope. This is yet another arbitrary restriction on employees' right to revoke their checkoffs and cease financial support of the Union. It is also an unlawful restriction on "protected concerted activity."

Similar to the discussion in Section II.B., *supra,* the "one revocation per envelope" restrictions contained in the CBA and the checkoff operate as an undue restraint on employees' ability to revoke their checkoffs and are facially unlawful. *See Felter*, 359 U.S. at 336. Just as in the case of certified or registered mail requirements, the Board has already struck down the additional restriction of "one letter per envelope" in other contexts as an unlawful and arbitrary limitation on employees' exercise of their Section 7 rights. *See Cal. Saw & Knife Works*, 320 NLRB at 237. If such petty restrictions are unlawful in the resignation and *Beck* objection contexts, they are surely unlawful in the dues checkoff revocation context, as in each case the employee is exercising her Section 7 rights. *Paramount Indus.*, 365 NLRB No. 30.

Additionally, employees who wish to send their checkoff revocations together, as a group, are engaged in protected concerted activity. *See NLRB v. City Disposal Sys. Inc.*, 465 U.S. 822, 830 (1984) ("The term "concerted activit[y]" . . . clearly enough embraces the activities of employees who have joined together in order to achieve common goals."); *Nestle USA*, No. 18-CA-231008, 2020 WL 1170791 (ALJD Mar. 11, 2020) (employee who solicited and obtained seven employee

signatures on a petition to complain about working conditions was clearly engaged in protected concerted activity). Restrictions on protected concerted activity violate the Act.

The Board has a three-part test to determine whether an employer violated employees' right to engage in protected concerted activity: (1) the activity must be concerted—that is, it must be engaged in with or on behalf of other employees; (2) the employer knew of the concerted nature of the activity; and (3) the adverse employment action was motivated by the protected activity. *Meyers Indus.*, 268 NLRB 493, 497 (1984), *remanded sub nom. Prill v. NLRB*, 755 F.2d 941 (D.C. Cir. 1985), supplemented by 281 NLRB 882 (1986), *aff'd sub nom. Prill v. NLRB*, 835 F.2d 1481 (D.C. Cir. 1987), *cert. denied sub nom. Meyers Indus., Inc. v. NLRB*, 487 U.S. 1205 (1988); *see Alstate Maint. LLC*, 367 NLRB No. 68 (Jan. 11, 2019) (reaffirming *Meyers Industries* standard).

Here, the checkoff and CBA provisions maintained by AT&T unlawfully infringe on employees' ability to engage in protected concerted activity. Employees may wish to send their revocations together as a show of solidarity and to protect their terms and conditions of employment. When sending revocation letters together, employees are per se acting in a "concerted" fashion. AT&T knew of the concerted nature of the activity, yet it specifically prohibited the employees from engaging in that concerted behavior. Finally, AT&T threatens an adverse employment action, namely, that it will not honor a checkoff revocation if it is sent in concert with other employees.

Therefore, AT&T's requirement that employees send their revocations individually is unduly burdensome upon employees' Section 7 right to refrain from assisting the Union, and operates as an unlawful restraint on employees' Section 7 right to engage in protected concerted activity.

CONCLUSION

For the foregoing reasons, the Board should overturn its erroneous *Frito-Lay* decision and adhere to the text and plain meaning of Section 302(c)(4). In so doing, the Board should find the AT&T unlawfully rejected Charging Party's checkoff revocations. Additionally, the Board should hold that Charging Party's checkoff was validly revoked pursuant to the rationale outlined in *Penn Cork*. Finally, the Board should find AT&T's maintenance and/or enforcement of unduly burdensome checkoff revocation mailing requirements unlawful. All of these acts should be found to violate Section 8(a).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on September 8, 2020, I filed the foregoing Charging Party's Brief on the Merits with the NLRB Executive Secretary, and served a copy of that document via e-mail to the following:

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